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IN THE

Supreme Court of the United States

MARGARET W. PEARSON, *and* J. R. PEARSON, *her husband*, *Appellants.* *vs.* THE UNITED STATES.	October Term, 1924 No. 264

BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants' rights spring from the relationship of landlord and tenant, and are contractual. The lease executed by appellants under which the United States secured possession of appellants ' land provided a specific time for the removal of buildings placed upon the land. Failure to comply with this contractual provision, removal of the buildings long after the agreed time limit and a violation by the tenant of the rights of the landlord, *and over appellants' protest*, constitute the basis for this action.

Furthermore, the taking of appellants' property, contrary to the terms of the lease contract, brings the case within the prohibition of the Fifth Amendment to the Constitution of the United States: "Nor shall private property be taken for public use without just compensation."

The rights of all parties to this suit are measured by the contractual status of landlord and tenant The chief function of a decision herein will be to define what these contractual rights are. Appellants have sustained damage by a "confiscatory breach of contract."

The instant case presents far more contractual elements than many cases which this Court has held to come within the jurdiction of the Court of Claims. This case is essentially a contract case. It is also a case arising under the Constitution of the United States.

Appellants object to any disposition of this case on a motion to dismiss or affirm, and submit that the merits of the case are of such importance as to require consideration after submission upon oral argument in regular course.

STATEMENT OF THE CASE

Under date of September 11, 1917, appellants executed a lease to certain of their real estate. This lease ran to Jacksonville Chamber of Commerce. Among its provisions were the following:

> "In consideration of the covenants contained herein on the part of the said lessee to be kept and performed, the said lessors do hereby lease to the said lessee the following property."

> "To have and to hold, The same for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall terminate and expire three years from the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years, which period is to expire upon the termination of said war should said war be terminated within three years from the date hereof."

"And the lessors, for themselves, their heirs, legal representatives and assignes, covenant and agree with the lessee, its successors and assigns, that all buildings, fixtures and / or other improvements placed in or upon said land during said term by the lessee, its successors or assigns, shall remain the exclusive property of the lessee, its successor or assigns, and at all times during the period of three months next after the expiration of said term said lessee, its successors, or assigns, may enter upon said land for the purpose of removing and may remove said buildings, fixtures and / or other improvements and the timber hereinabove and hereby granted, bargained and sold to the lessee."

In addition to leasing the land, this instrument also sold certain standing timber to the lessee, the removal of which was covered by the last provision above.

Shortly after the execution of this lease, the Jacksonville Chamber of Commerce verbally agreed with the War Department that it might use this land as a part of Camp Johnston, which was done and extensive hospital buildings were erected by the War Department upon appellants' land. (R. 2).

By Act of Congress of March 3, 1919, (40 *Stat.* 1302), this hospital was transferred to the Treasury Department for the use of the Public Health Service. (R. 3).

The three years' duration of the lease expired September 10, 1920, and the three months' period for removing the buildings expired on midnight of December 10, 1920. On December 9, 1920, appellants' attorney delivered a letter to the commanding officer at Camp Johnston, pointing out therein that the period for removal of the buildings ceased on December 11, 1920, and that after that date *there should be no "removal or molestation" of the improvements.* (R. 3).

Under date of March 28, 1921, the Surgeon General

addressed a letter to appellants' attorney, in which it was stated:

> "Owing to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until about May 1, 1921." (R. 6-7).

Promptly upon receipt of this letter, appellant's attorney replied with *a vigorous protest against the removal of the buildings* contrary to the terms of the lease. (R. 7-8).

Nevertheless, the United States removed the buildings. This suit is brought to recover the value of all buildings and improvements removed in violation of the contract. (R. 8).

The United States demurred to the petition, upon the sole ground that "it does not set forth a cause of action against the United States within the jurisdiction of this Court." (R. 12).

The Court of Claims sustained this demurrer and dismissed the petition, upon the ground that there had been no breach of contract, and that the United States took property to which it asserted title "before it utilized the same." (R. 12-14).

Specification of Errors

1. The error of the lower Court in holding that there had been no breach of the contractual obligation between landlord and tenant.

2. The error if the lower Court in holding that appellants were not entitled to compensation for private property taken for public use.

3. The error of the lower Court in holding that it was without jurisdiction in this case.

4. The error of the lower Court in dismissing the petition herein.

ARGUMENT

I

Appellants Entitled to Recover for Breach of Contractual Obligation Between Landlord and Tenant

Camp Johnston was constructed by the Secretary of War under authority of the Act of July 2, 1917. (40 Stat. 241). This Act of Congress authorized the Secretary of War to contract for the use of land for camp sites. The authority to contract includes authority to agree upon terms.

The action of the Secretary of War in contracting for the use of appellant's land and in erecting the hospital thereon, was necessarily ratified and approved by Congress when it directed that this hospital be transferred to the Treasury Department for the use of the Public Health Service (40 Stat. 1302). Further ratification and approval of the acts of government officials with respect to this hospital may be found in the Act of Congress authorizing the President to transfer to the United States Veterans Bureau the "operation, management and control of specifically designated hospitals now under the jurisdiction of the Public Health Service," (42 Stat. 150). Under authority of this latter statute the President, by an executive order, transferred the hospital in question to the Veterans Bureau.

There can be no question of unauthorized use of the lands by the erection of the hospital. There can be no question whose lands were occupied. There can be no question of consent of the owners to the occupation by the United States. The Government can have no greater rights than those granted by the lease to the Jacksonville Chamber of Commerce. If the Government should not come within the terms of this lease, then the result announced in *United States v. Pacific R. R. Co.*, 120 U. S. 227, 239, 30 L. Ed. 634, 638, occurs:

> "Private parties cannot be charged for works constructed on their lands by the Government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the Government, or to pay for such works when erected by the Government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the Government.
>
> "It is true that in some instances the work thus constructed may afterwards be used by the owner; a house built for a barrack, or for the storage of supplies or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property, belonging to an individual, without his consent or request, he cannot be held responsible because of the subsequent use. *It becomes his by being annexed to the soil* (italics ours); and he is not obliged to remove it to escape liability."

Railroad bridges are no more essential to an army than are training camps.

In *Van Ness v. Pacard*, 2 Pet. 137, 143, 7 L. Ed. 374, 377, the law is thus announced:

> "The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance."

But the Government recognized itself at all times as a tenant. Consequently, it cannot deny its landlord's title. *Willison v. Watkins*, 3 Pet. 43, 47, 7 L. Ed. 596, 598; *35 C. J. 1224*. That there may be an implied contract of tenancy on the part of the United States is established in *Carpenter v. United States*, 17 Wall. 489, 21 L. Ed. 680.

The privity between a landlord and tenant is accurately described in *Rector vs. Gibbon*, 111 U. S. 276, 284, 28 L. Ed. 427, 430, where it is shown that the possession of the tenant is in law the possession of the landlord, that the tenant is under duty to surrender his possession upon the termination of the lease and is estopped to deny the landlord's rights. It is further stated that these obligations extend 'to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law, or by purchase and assignment."

Since the United States claims under the lease to the Jacksonville Chamber of Commerce, its rights to the improvements must be tested by that instrument. As stated in *Allen v. Gates*, 73 Vt. 222, 50 A. 1092, 1093:

> "When the parties to a lease make specific provisions therein relating to the tenant's erecting buildings or other structures on the property leased, and the time of removing the same or of otherwise disposing of them, such provisions are of binding force between the parties, and are controlling."

Similarly in *Vanhoozer v. Gattis*, 139 Ark. 390, 395, it is said:

> "Tenants must remove buildings placed by them upon leased premises within the time specified in their leases, else they immediately become a part of the real estate to which attached."

In *Hughes v. Kershow*, 42 Col. 210, 93 Pac. 1116, 15 L. R. A. N. S. 723, 725, it is said:

> "In the lease it was expressly stipulated that all improvements erected upon the property by the lessee should belong to him, and that he might remove the same during the sixty days last preceding the expiration of the lease, provided he had paid all rents, taxes, and assessments agreed to be discharged by him. Thus by express contract, the building mentioned became personal property during the life of the lease. This provision was for the benefit of the lessee; but, to avail himself of such benefit, it was incumbent upon him to remove the building before expiration of the contract. If he failed to do so in accordance with the terms specified, then upon expiration of the contract, by operation of law, the building ceased to be personalty. Its character as a fixture attached, and it at once became a part of the real estate."

In *Uffman v. Meyle*, 181 App. Div. 944, 168 N. Y. S. 483, it is declared:

> "Plaintiff was bound by the lease, which he had executed and retained. When he received from the defendant the written notice to terminate the tenancy, but nevertheless allowed the six months to run out without removing the buildings, plaintiff elected to abandon them to the lessor."

An important case is that of *Texas and N. O. R. Co. v. Clevinger*, (Tex. Civ. App.) 223, S. W. 1036, 1038, from which we quote the following:

> "By the terms of the contract, plaintiff had a reasonable time, after notice of the termination of his lease, in which to remove the house. Had he failed to comply with this request within a reasonable time, he would have forfeited his right to remove the house from the right of way. 'In the absence of a special stipulation to the contrary, fixtures placed upon the demised premises by the tenant are personal property, subject, however, to become parts of the realty, if not removed by him during the time allowed him by law for their removal.' *Wright v. McDonnell*, 88 Tex. 140, 30 S. W. 907. On the facts of this record, it became a pertinent inquiry as to whether the plaintiff had been allowed a reasonable time in which to remove his house from the leased premises, when the servants of the Director General of Railroads entered thereon and tore it down. If a reasonable time had elapsed, then this defendant was in no way liable to plaintiff, because the house would become a part of the realty."

The stipulation for a definite time in which a tenant may remove improvements is meaningless, if it be held that the tenant may remove the improvements after the expiration of the stipulated time. *Expressio unius est exclusio alterius.*

It is expressly stipulated in the lease under consideration that:

> "In consideration of the covenants contained herein on the part of the said lessee to be kept and performed, the said lessors do hereby lease to the said lessee the following property." (R. 9).

The principles here applicable have probably been considered most extensively in cases having to do with sales of standing timber, where a limited time for removal is stipulated. The holding of this class of cases is summarized in 17 *R. C. L.* 1085-6 (published in 1917), as follows:

> "The weight of authority is apparently to the effect that while a contract for the sale of standing timber passes title to the timber, such title is subject to defeasance as to the timber not removed within the time limited, whether the limitation be the implied one of a reasonable time, in which event some courts have based their decision upon the theory of abandonment, or whether the limitation be expressly fixed in the instrument itself, and the timber remaining standing at the end of the limtied period is the property of the vendor."

Subsequently in a note published in 1921 and found in 15 *A. L. R.* 70, it is said:

> "When the contract specifies a time for the removal of timber, *the great majority* (italics ours) of courts hold that the rights of the purchaser terminate upon his failure to remove within the time stated, and reinvest in the owner of the land."

The accuracy of this quotation is conclusively established by exhaustive references to decisions.

That "the great majority of courts" so hold is again shown in a very recent note, published in 1924, and found in 31 *A. L. R.* 948.

In a single sentence taken from *Williams vs. McCarty*, 82 W. Va. 158, 95 S. E. 638, 100, S. E. 565, 15 A. L. R. 9, 16, the common sense of the matter is thus expressed:

> "If he would get the advantage of his purchase he must remove the timber within the time specified in the contract."

The lease under consideration also embodies a sale of standing timber with a stipulated time for removal (R. 9, 10). This suit does not involve this timber, except as an aid to interpretation of the lease. *It would be a strange construction to say that the identical clause*

prescribing the time for removal meant one thing with reference to removal of timber but meant something entirely different when applied to removal of buildings.

The Texas case of *Reader v. Christian* (Tex. Civ. App.) 234, S. W. 155, relied upon by appellee, (Page 7 of Motion to dismiss or Affirm), is poorly reasoned and wholly out of line with legal principles and authorities upon the point to which it is cited. This was demonstrated by one of the members of the Court who dissented from this portion of the decision, and who showed that the holding in this respect was contrary to the settled law of Texas as evidenced by *Texas and N. O. R. Co. v. Clevenger,* which case is quoted from at page 8 of our brief. Furthermore, in *the Reader case,* it was clearly made to appear that the owner of the reversion by his conduct and representations had estopped himself from insisting upon a removal of the improvement within the stipulated time. *In the instant case, not only is there no such estoppel, but on the contrary, we find that appellants protested again and again against the removal.* (R. 3 to 8).

The rule in Texas as applied to the removal of timber is contrary to that stated in *the Reader case* with respect to buildings. In *Conn v. Houston Oil Company,* Tex. Civ. App. , 218 S. W. 137, the Texas rule for timber contracts is thus stated:

> "Timber deeds and contracts, containing time limits for the removal of timber, pass no title whatever, save to so much of the timber as the vendee may remove within the time limited."

See also *Broocks v. Moss,* Tex. , 212 S. W. 153.

Florida also follows the majority rule in the construction of timber contracts: *Livingston v. Drew Lumber Co.,* 82 Fla. 508, 90 So. 466.

Appellee's argument confuses an unequivocal trespass, or an act which is exclusively a tort, with an act which is a breach of a contractual obligation. For instance, the case of *Langford v. United States*, 101 U. S. 341, relied upon by appellee, is distinguished in the subsequent case of *Dooley v. United States*, 182 U. S. 222, 226, 45 L. Ed. 1074, 1079, as follows:

> "It was held that the act of the United States in taking and holding possession, was an *unequivocal tort*, and a distinction was drawn between such a case and one where the Government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which case there arises implied obligation to pay the owner its just value." (Italics ours).

In other words the ground work of the instant case is not tortious, but based upon a relationship of landlord and tenant. A tort is sometimes defined as a civil wrong independent of contract. See *Pollock* on *Torts*, Chapter I. See also the interesting discussion of what acts do and do not constitute torts in *Alexander v. United States*, 39 Ct. Cl. 383.

We find in international law certain cases which are classified as "Confiscatory Breaches of Contract," in which the breach of contract also amounts to a tort and a confiscation of property. See *Moore's International Law Digest*, Sec. 997. This term is appropriately applicable to the present state of facts.

Appellants did not elect to treat appellee as a trespasser after the expiration of the period stated in the lease to the Jacksonville Chamber of Commerce. The holding over created a tenancy at sufferance. The holding over was under the original entry.

This situation is specifically covered by statue in Flor-

ida. Section 3570, *Revised General Statutes of Florida*, provides:

> "That when any tenancy shall have been created by an instrument of writing and the term of which such tenancy is (as) limited therein shall have expired and the tenant shall hold over in the possession of said premises without renewing the said lease by some further instrument of writing then such holding over shall be construed to be a tenancy at sufferance, and the mere payment or acceptance of rent shall not be construed to be a renewal of the said term, but if such holding over be continued with the consent of the lessor then such tenancy shall become a tenancy at will under the provisions of this Act."

Section 3567, *Id.*, provides:

> "That any lease of lands and tenements, or either, hereafter made, shall be deemed and held to be a tenancy at will unless the same shall be in writing signed by the lessor."

By these statutes any claim that appellee was a trespasser and wrongfully entered upon the land is dissipated.

Such holding over relates only to the extension of the occupancy of the land. It did not renew the former lease, particularly where the holding over was by a sub-tenant who was no party to the formal written lease, and which sub-tenant held by mere verbal agreement.

A case in point is *United States v. Bostwick*. 94 U. S. 53, 24 L. Ed. 65, in which the court declared:

> "The United States when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case;

but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agree upon."

"It appears in the finding that, during the occupancy under the lease, ornamental trees were destroyed, fences and walks torn down, and the materials used for sidewalks and the erection ot other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. *This was voluntary waste*, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action." (Italics ours).

In the case of *Tempel v. United States*, 248 U. S. 121, 130, 63 L. Ed. 162, 165, the court indicates its approval of the earlier case of *United States v. Lynah*, by quoting therefrom, among other things, as follows:

"Whenever in the exercise of its governmental rights, it (the United States) takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

We need not go nearly so far in this case as the court went in *United States v. State National Bank of Boston*, 96 U. S. 30, 36, 24 L. Ed. 647, 648, where it said:

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. There sovereignty is in nowise involved."

"Surely it ought to require neither argument nor authority to support the proposition, that, where the

> money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

In *Lyons v. United States*, 30 Ct. Cl. 352, 360, the long recognized rule pertaining to Government contracts is thus announced:

> "The law, as we understand it, was stated by Hamilton in these words: 'When a Government enters into a contract with an individual it deposes, as to the matter of contract, its constitutional authority, and exchanges the character of a legislater for that of a moral agent with the same rights and obligations as an individual.' (3 Hamilton's Works, page 518)."

The United States demands strict performance of its contracts by the other party thereto. For instance, Attorney General Black in an opinion to the Secretary of War upon an application for relief by a contractor, remarked (9 *Op. At. Gen.* 81):

> "He now says he is doing the work at a loss, and asks you, in a memorial, either to give him a larger compensation than he bargained for or else to release him from the contract. You have no authority to do either of these things. You can not absolve him from his obligation to do the work; and, if he does it, you can not authorize him to be paid for it at higher price than the contract stipulates for. * * * In short, you have no power to relieve him from the hardship he complains of, either by giving him damages, by releasing him from the present contract, or by making a new one. * * * If the contractor quits the work or otherwise violates the covenants he has made with the Government, he must do so at his own peril and that of his sureties."

Many other statements of the strictness with which the United States requires fulfillment of contracts, are set forth in *Dig. Op. J. A. G.*, 1912, page 325, Note 2.

Will the Government demand complete performance from the other party, and in the same breath contend that it can disregard its obligation with impunity?

That the United States must live up to its contracts, even though by oversight of some officer, it thereby sustains a loss, is declared in *Cooke v. United States*, 91 U. S. 389, 398, 23 L. Ed. 237, 243, as follows:

> *"A government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.* Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost. *U. S. v. Barker*, 12 Wheat. 559. *Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect.* But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world." (Italics ours).

In appellee's brief, reliance is placed upon an alleged claim of title by the United States to the improvements at the time of their removal. There are two answers to this.

In the first place, no claim of title by the United States to these improvements was made at the time of the removal. The letter of the Surgeon General dated March 28, 1921, (R.6), does not claim title in the United States to these improvements. The language of this letter: "Owing to the necessity of salvaging *certain materials placed upon the property* by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until May 1, 1921," is too vague and indefinite to stand as a claim of title to *the permanent structures erected upon appellant's land.*

In the second place, the supposed claim of title asserted in appellee's brief, arises out of the very contract which is the subject matter of the suit, and is merely the equivalent of a denial of liability. Appelle cannot divorce the wrong to appellants from the contractual relationship. In all contested cases before the Court of Claims, the United States asserts that the right or title involved is not with plaintiff, but is with the Government. This constitutes the issue the Court is called upon to adjudicate.

It is submitted that appellee as tenant violated the rights of appellants as landlords, and that this gave rise to a contractual liability within the jurisdiction of the Court of Claims.

II

Appellants Entitled to Compensation for Private Property Taken for Public Use

Appellee's demurrer admits that appellants' property was taken by the United States and that this was taken for the purpose stated by the Surgeon General,— to build

hospitals (R. 6). This is a taking of private property for a public use. The Surgeon General had been put in charge of the hospital at Camp Joseph E. Johnston by direct Act of Congress (40 Stat. 1302). The Act of Congress, however, did not and could not enlarge the right or title of the United States to the ground upon which the hospital stood, or alter the limitations coupled therewith.

This hospital having been thus placed by Congress in the charge of the Surgeon General, he proceeded to exercise his authority. Congress placed no time limit on this authority. The authority carried with it all the means and power which by implication necessarily accompany authority conferred on an executive officer. It continued until the order of the President transferred this hospital (although by that time demolished) to the United States Veterans Bureau (R. 8). The Surgeon General determined that certain buildings should be transferred to another hospital. This he had authority to do. See 32 *Op. At. Gen.* 411. While proceeding with this authority the Surgeon General went too far, or delayed too long, with the result that appellants' property was appropriated to the use of the Government.

Unless appellants obtain the relief sought, their property will have been taken from them for the use of the Government or public, and the burden would fall entirely upon appellants and not upon the public generally. In such case payment must be made to prevent inequality.

> *Michigan Cent. Ry. Co. vs. Slack*, 17 Fed. Cas. No. 9,527a, affirmed 100 U. S. 595, 25 L. Ed. 647.
>
> 11 *Fed. Stat. Ann.* 2nd Ed. 452.

The following quotation from *United States vs. Pacific*

R. R. Company, 120 U. S. 227, 239, 30 L. Ed. 634, 638, shows (a) that appellants' property was taken for a public use, (b) that appellants' are entitled to compensation:

> "In what we have said as to the exemption of Government from liability for private property injured or destroyed during the war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies such as vessels, steamboats, and the like, for the transport of troops and munitions of war, or buildings to be used as storehouses and places of deposit of war material, *or to house soldiers or take care of the sick*, or claims for supplies seized and appropriated. In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell V. Harmony*, 54 U. S. 13 How. 134 (14:83); *U. S. v. Russell*, 80 U. S. 13 Wall. 623 (20:474)." (Italics ours).

In *Shoemaker v. United States*, 147 U. S. 282, 297, 37 L. Ed. 170, 184, the Court said, respecting what constitutes a public use:

> "Land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use."

If use for parks constitutes a public use, certainly providing Government hospitals for disabled soldiers, sailors and marines *a fortiori* constitutes a public use.

In *United States v. Russell*, 13 Wall. 623, 627, 20 L. Ed. 474, it is declared:—

> "Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. 2 Kent. Com., 11th ed. 339; 2 Story, Const., 3d ed. 596."

In *Filbin Corporation v. United States*, 266 Fed. 911, the District Court of the United States for the Eastern District of South Carolina, announced the following principles:—

> "The language of the Fifth Amendment to the Constitution of the United States is:
>
> > 'Nor shall private property be taken for public use without just compensation.'
>
> "Nothing is said about 'requisition' or 'condemnation;' the word used is 'taken.' The result of either condemnation or requisition is *a taking*, and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation, and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of that of the public, and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation."

Appellants did not suffer mere consequential injury. Their property was taken from them. The following from *United States v. Lynah*, 188 U. S. 445, 471, 47 L. Ed. 539, 549, applies:

> "If any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation."

Alexander v. United States, 39 Ct. Cl. 383, is a case in which claimant's farm in Pennsylvania was taken by authority of the Secretary of War for a military camp during the Spanish-American War. When the troops left, the land was in bad condition; fences had been destroyed, and other damage done. The case is particularly interesting and applicable. Among other things, the court said:

> "The decedent in this proceeding had the fee-simple title — the highest estate which can be held in land, but subservient to the paramount right of the Government to take it for public use, upon the condition that compensation be made to him for its use, or its value."

> "The value of that estate was taken to the extent that the extraordinary use by the defendants impaired its value, and from which the defendants derived a substantial benefit in the use and occupation of the land for military purposes."

> "The court will take judicial notice of the condition of the Government during the existence of the Spanish war; that it was in no embarrassed condition in the resources of supplies to occasion the exercise of the powers of war, such as surrounded it during the Civil War. The law was not silent in the

> State or Pennsylvania, so as to deprive the citizen from all the safeguards of the Constitution in the protection of his rights of property and the lawful means of redress."

The quotation *supra* from *United States v. Pacific Railroad Company,* announced the principles by which our Government adjusted claims arising prior to and during the Civil War. *Alexander v. United States,* presents the rule which was applied to claims resulting from the Spanish-American War.

We find these principles applied by the Judge Advocate General of the Army to similar claims arising during the recent World War. In 2 *Op. J. A. G.* (1918) page 961, it is said:

> "In regard to those claims where there exists no lease between the claimants and the United States on the buildings, etc., which were taken, used, or destroyed with the consent of the owner, expressed or tacit, then there arises an implied promise on the part of the United States to pay just compensation and, therefore, in the opinion of this office such claims having been properly determined by the board, and acquiesced in by the owners, may be paid."

Until we are prepared to repeal the 5th Amendment to the United States Constitution, it is submitted that appellants are entitled to recover for their property taken by the United States for a public use, and the Court of Claims has jurisdiction of the matters presented by the petition.

III

Jurisdiction of the Court of Claims Embraces Four Classes of Cases

The Court of Claims has jurisdiction over four classes of cases, namely:—

> "(1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words 'not sounding in tort' are in terms referable only to the fourth class of cases."
>
> *Dooley vs. United States*, 182 U. S. 222, 224, 45 L. Ed. 1074, 1078.
>
> *Alexander vs. United States*, 39 Ct. Cl, 383, 392.

A claim against the Government for salvage, is an illustration of the fourth class. *The United States vs. Cornell Steamboat Company*, 202 U. S. 184, 50 L. Ed. 987.

The rights of appellants which appellee violated fall within two of these four classes. Defendant's acts constitute (a) a taking of private property for public use, (b) a violation of the contractual relation of landlord and tenant, coming respectively within the Ist and 3rd classes of cases just enumerated over which the Court of Claims has jurisdiction.

CONCLUSION

The petition shows no unlawful entry. It shows a holding over after a rightful entry. Appellee did not surrender possession until after it had committed the waste or completed the taking which constitutes the foundation of this action. This holding over was by statute in Florida, neither a wrongful entry nor a trespass. Appellee was at all times in possession under appellants, holding in subordination to their title.

There are situations in which the United States cannot claim title and proceed to appropriate property without liability. No more evident case of this sort could be found than one in which the United States secures possession of land as tenant and while in such possession repudiates the title of the landlord. That is this case, under the government's contention.

The cases relied upon by appellee in which it was held there was no right of action against the United States were cases of unequivocal torts, (See page 12 of this brief.) The instant case meets the jurisdictional requirement announced in *Schillinger v. United States*, 155 U. S. 162, 167, 39 L. Ed. 108, 110: "Some element of contractual liability must lie at the foundation of every action."

It is submitted that this case is founded (1st) upon contract, and (2nd) upon the Constitution of the United States. Over such a case the Court of Claims has jurisdiction, and its judgment dismissing the petition should be reversed.

Respectfully submitted,

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